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In the Supreme Court of the United States

OCTOBER TERM, 1976

DENISE DONAHEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 529 F. 2d 831.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on April 5, 1976, and a petition for rehearing (Pet. App. C) was denied on May 3, 1976. The petition for a writ of certiorari was filed on June 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the government was required to carry out a plea bargain agreement which petitioner had violated.

2. Whether petitioner was entitled to immunity from prosecution on equitable grounds.

3. Whether petitioner's testimony before the grand jury, given without cautioning warnings, violated her privilege against self-incrimination, where the grand jury did not rely upon the testimony and it was not introduced in evidence or otherwise used at trial.

4. Whether petitioner was properly convicted of unlawfully importing a controlled substance even though she may not have known the particular substance was cocaine.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of unlawful importation of a controlled substance (cocaine), in violation of 21 U.S.C. 952(a), and was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence showed that on October 13, 1974, customs inspectors at the Miami International Airport discovered approximately 1,500 grams of cocaine concealed in the lining of petitioner's luggage as she returned to this country from Colombia (Tr. 20-24, 55).

After being advised of her constitutional rights, petitioner told an agent of the Drug Enforcement Administration that her trip to Colombia had been arranged by a wealthy businessman, Vincent Marotta, with whom she was conducting a clandestine love affair. She stated that Marotta had given her the bag in which the cocaine was discoverd as a birthday gift and had selected a female companion to accompany her to Colombia. Shortly after her arrival in Bogota, Marotta telephoned and instructed her to descend to the lobby of her hotel; there, she met an unknown man who claimed that Marotta had sent him to retrieve the bag she had been given. She stated that she surrendered the bag and left for dinner, but that the bag had been placed in her hotel room by the

time she returned. Marotta then telephoned and instructed her to meet him at a designated hotel in Miami. Petitioner acknowledged that she had inspected the bag before leaving Colombia and noticed that it had been altered. She told the agent that although she believed that contraband was concealed in the lining of the bag, she believed that she was smuggling precious stones, not cocaine (Tr. 38-41).

On October 17, 1974, four days after her arrest, petitioner signed a plea bargain agreement with the government by which, in return for her testimony before a grand jury and her full cooperation with the prosecution of Vincent Marotta, the government would permit her to plead guilty to a misdemeanor charge and would recommend a sentence of one year's probation.[1] The following day, petitioner testified before a grand jury about the cocaine importation scheme. She also provided additional information about her activities to government agents, who later voiced the unanimous opinion that petitioner had not cooperated with the Marotta investigation but had provided false, evasive, and misleading answers (Pet. App. A 37). Subsequent investigations revealed that petitioner was not an uninitiated drug courier, as she claimed, but had had close relationships with several known drug dealers.

Prior to trial, the district court conducted a hearing on the government's request that it be relieved of its commitment under the plea agreement. Three law enforcement officers testified that they had spent significant time investigating false information petitioner furnished (Transcript of March 11, 1975, Hearing). The court concluded that petitioner had failed to fulfill her commitment under the plea bargain and relieved the government of its obligations thereunder.

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[1]The agreement is set forth at Pet. 8.

ARGUMENT

1. Petitioner contends (Pet. 18-19) that the government improperly violated the plea bargain agreement by prosecuting her on this felony charge. But, as the courts below found, petitioner had not carried out her part of the bargain to cooperate fully with the government's investigation of the cocaine importation conspiracy but had been evasive, uncooperative and had provided misleading information. Petitioner's violations of her side of the agreement relieved the government of its obligations thereunder (Pet. App. A 37). See *United States* v. *Nathan*, 476 F. 2d 456, 459 (C.A. 2), certiorari denied, 414 U.S. 823.[2]

2. Petitioner was not granted immunity from prosecution under 18 U.S.C. 6002, 6003. She claims (Pet. 20-22), however, that because her grand jury testimony was given in a spirit of cooperation pursuant to the plea bargain agreement, she was entitled to immunity from prosecution on general equitable grounds. But petitioner's prosecution resulted from her own failure to live up to the plea bargaining agreement, and there is no basis for giving her immunity on equitable grounds—assuming *arguendo* that the courts may do so.

3. After entering into the plea bargain agreement, petitioner testified before the grand jury about this cocaine importation scheme. Prior to her testimony, she was not given *Miranda* warnings or informed that she was a prospective defendant. Petitioner gave incriminatory testimony (Pet. App. A 37).

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[2]None of the cases which petitioner claims (Pet. 18-19) conflict with the decision below considered whether the government was required to adhere to its part of a plea bargain agreement once the defendant had violated his commitments. Those decisions simply involved a unilateral breach by the prosecution of its promises. See *Santobello* v. *New York*, 404 U.S. 257.

Petitioner's grand jury appearance occurred after the Fifth Circuit had ruled that putative defendants appearing before a grand jury must be informed of their right to counsel and to remain silent. *United States* v. *Mandujano*, 496 F. 2d 1050, reversed, No. 74-754, decided May 19, 1976. Upon realizing that petitioner had not been so informed, the prosecutor asked the grand jury to disregard her testimony and to base their determination solely upon the testimony of the investigating D.E.A. agent. Two days later, the grand jury returned the indictment. Petitioner's grand jury testimony was not relied upon or referred to in any way at her trial (Pet. App. A 37, 39).

a. Petitioner contends (Pet. 23-24) that her indictment by the grand jury that considered her testimony given without prior cautionary warnings violated her privilege against compulsory self-incrimination. The prosecutor, however, told the grand jury to disregard petitioner's testimony, and the court of appeals found that the indictment was drawn without reference to that evidence (Pet. App. A 39). Petitioner's contention, therefore, is not supported by the record. In any event, an indictment valid on its face cannot be challenged on the ground that the grand jury acted upon inadequate or improper evidence or upon information obtained in violation of a witness's Fifth Amendment privilege against self-incrimination. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 345; *Lawn* v. *United States*, 355 U.S. 339, 349-350. None of petitioner's grand jury testimony was referred to or relied on at trial, so that regardless of the sufficiency of the grand jury warnings, petitioner's privilege against compulsory self-incrimination was not violated. See *United States* v. *Mandujano*, *supra*.[3]

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[3]Disposition of the instant petition need not be deferred pending this Court's decisions in *United States* v. *Wong*, No. 74-635, certiorari granted, June 1, 1976, and *United States* v. *Washington*, No. 74-1106, certiorari granted, June 1, 1976. Those cases concern the

b. Petitioner also contends (Pet. 24-29) that the prosecutor's instruction that the grand jury disregard petitioner's testimony improperly prevented that body from considering the exculpatory portion of her testimony. Such objections to the evidence considered by the grand jury in returning a valid indictment are barred. See, *e.g.*, *United States* v. *Calandra*, *supra*. Furthermore, although the grand jury is not prohibited from calling a potential defendant to testify, and thus providing him an opportunity to explain potentially damaging evidence before returning an indictment, see *United States* v. *Dionisio*, 410 U.S. 1, 10, n. 8, that person has no absolute right to appear before the grand jury to state his case. Since there was sufficient evidence from other witnesses from which the grand jury could infer probable cause (Pet. App. A 39), petitioner cannot invalidate the indictment because the grand jury was instructed to disregard all her testimony, both inculpatory and exculpatory.

4. Finally, petitioner contends (Pet. 31-32) that the trial court erred in failing to instruct the jury, in response to a question (Tr. 177-179), that she could be convicted only if she knew that the controlled substance she was importing was cocaine. All the courts of appeals that have considered a similar argument have rejected it. See,

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admissibility at trial of a defendant's grand jury testimony obtained after allegedly inadequate cautionary warnings had been given. Here, however, petitioner's grand jury testimony was not used against her at trial.

e.g., *United States* v. *Jewell*, 532 F. 2d 697, 703-704 (C.A. 9), certiorari denied, June 21, 1976, No. 75-6471; *United States* v. *Moser*, 509 F. 2d 1089, 1092-1093 (C.A. 7).[4]

21 U.S.C. 952(a) bars the importation of "any controlled substance" or "any narcotic drug" listed in certain schedules. A defendant who knows that he is importing a controlled substance violates this provision even if he does not know which controlled substance he is transporting. A contrary rule would confer immunity upon any drug courier able to establish that, even though he knew that he was unlawfully importing a controlled substance, he was unaware of its precise identity.

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[4]Contrary to petitioner's assertion (Pet. 32), the decision below does not conflict with the decision of any other court of appeals. In *United States* v. *Lasalandra*, 421 F. 2d 1261 (C.A. 2), certiorari denied, 398 U.S. 931, the court affirmed a conviction for unlawfully importing narcotics under the predecessor of Section 952(a) where the defendant admitted "knowing he was smuggling some type of drugs," and the jury was "properly charged on the necessity for knowledge that the substance was narcotics" (*id.* at 1262). The court did not hold that the prosecution was required to prove that the defendant knew that the narcotics were heroin. In *United States* v. *Christmann*, 298 F. 2d 651, 654 (C.A. 2), the court simply reversed where an erroneous supplemental instruction permitted the jury to convict even if the defendant did not know that the substance she was importing was narcotics.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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